

1 John Furlong
Acting Chief Bar Counsel
2 Bar No. 018356
State Bar of Arizona
3 4201 North 24th Street, Suite 200
Phoenix, Arizona 85016
4 (602) 252-4804

5
6 **IN THE SUPREME COURT
STATE OF ARIZONA**

7 In the Matter of a PETITION) Supreme Court No. R-_____
8 TO AMEND SUPREME COURT)
RULE 50 and INCLUDE 50.1)
9)
10) Petition to Amend Supreme Court
Rule 50 and Include 50.1

11 Pursuant to Rule 28 of the Rules of the Supreme Court, the State Bar of
12 Arizona ("State Bar") petitions the Arizona Supreme Court to amend Rule 50
13 of the Rules of the Supreme Court, and include Rule 50.1, as set forth in
14 Appendix A, attached hereto.

15 I. Overview and Summary of Proposed Changes

16 The Court has worked consistently over the years to improve the
17 efficiency of the adjudicatory process and has established rules and adopted
18 rule changes that were designed to promote the highest level of effectiveness.
19 In the late 1990's the Court directed attention to the overall efficiency of the
20 formal disciplinary process. Historically, volunteer hearing officers appointed

1 by the Supreme Court have adjudicated formal disciplinary matters regarding
2 attorneys.

3 In November 2006, the Court, in an effort to determine where any
4 inefficiency lay, appointed the Honorable Jeffrey Coker as a hearing
5 officer/process improvement consultant.¹ In order to allow compensation for
6 Judge Coker's work as a hearing officer, the court suspended the portion of
7 Rule 50(e), Ariz.R.Sup.Ct., which precludes compensation for hearing officer
8 services.

9 Over the next six months, Judge Coker adjudicated a number of
10 disciplinary cases. He reported to the Court at its May 2008 retreat on the
11 value of the paid hearing officer position along with recommendations on
12 improvements to the process. On July 1, 2008, Judge Coker was reappointed
13 as a hearing officer until December 31, 2009.

14 The Court has since taken another step to incorporate paid hearing
15 officers as a measure to achieve the timelines it has established for the
16 processing of formal disciplinary cases. On November 26, 2008, by
17 Administrative Order No. 2008-95, the Court appointed the Honorable
18 Jonathan Schwartz, a retired Maricopa County Superior Court judge, as a

19 ¹ On November 8, 2006, Judge Coker was appointed by Administrative Order No. 2006-98. In the order
20 the Court cited that it "is desirous of expediting the process by which attorney disciplinary complaints are
handled and wished to establish an experimental program in order to evaluate the feasibility and efficacy
of paid hearing officers in such matters."

1 second paid hearing officer for the purpose of adjudicating disciplinary cases.
2 Again, the Court suspended the provision of Rule 50, Ariz.R.Sup.Ct., to allow
3 for the payment of Judge Schwartz's services of a hearing officer.

4 The Rule change proposed by this petition will codify the practice of
5 appointing paid hearing officers and would establish the paid hearing officer
6 position as the sole means of adjudicating formal disciplinary cases. The
7 proposed Rule 50.1 would continue the role of volunteers in the disciplinary
8 system, by having volunteers utilized for the purpose of facilitating settlement
9 conferences in formal disciplinary matters.

10 The proposed Rule would allow for the appointment of no more than five
11 hearing officers to adjudicate all formal disciplinary cases and provide that
12 they be compensated for their services. The adoption of this Rule will promote
13 the efficiency of the process and will produce a consistency in the process that
14 does not currently exist. Moreover, by establishing the paid hearing officer
15 position for the administration of the adjudicatory process, the Court will
16 professionalize the hearing officer function.

17 The pool of volunteer hearing officers appointed by the Court give of their
18 time to the support and betterment of the regulatory system. These individuals
19 are dedicated and make every effort to ensure cases are being heard efficiently
20 as well as establishing a consistent result. This pool of volunteers, however, is

1 composed of, by and large, practicing lawyers who take time away from their
2 practice in order to preside as a hearing officer in a disciplinary case. The time
3 it takes for them to hear a case, and then to produce a written report and
4 recommendations as to the outcome can take a considerable amount of time
5 away from their practice. If their responsibilities as a hearing officer conflict
6 with the volunteer's obligations to their clients or the court or otherwise
7 interferes with their income source, the disciplinary case could become a
8 secondary consideration.

9 Additionally, and out of necessity, volunteer hearing officers are exposed
10 to only a handful of disciplinary cases each year so that their service as a
11 hearing officer does not overburden their practice. As a result, their ability to
12 develop both efficiency and uniformity in the process is hampered by their
13 relatively limited exposure to the disciplinary process.

14 Paid hearing officers would not have the same conflicts. They would by
15 their decision to apply, and if selected serve, as a paid hearing officer be
16 making a commitment to prioritize the duties and responsibilities incumbent in
17 the position. Those duties and responsibilities would not, therefore, be
18 subjugated to other professional responsibilities.

19 Having longer stretches of time dedicated to the disciplinary process
20 becomes even more critical with the Rule changes effective January 1, 2009.

1 The Court adopted changes to Rule 57 that require that all disciplinary hearings
2 occur on consecutive days absent extraordinary circumstances. *See*, Rule
3 57(j)(1), Ariz.R.Sup.Ct., effective January 1, 2009. Most disciplinary hearings
4 require more than a single day to complete. In the past, volunteer hearing
5 officers have scheduled hearings over the span of several weeks to allow for
6 their own professional responsibilities as a practicing lawyer. Although this is
7 completely understandable in that context, this demonstrates that the
8 constraints on volunteers are such that the disciplinary case may not always be
9 their first priority. The dedicated time of the paid position should comfortably
10 achieve the requirement that hearings be conducted on consecutive days and, in
11 general, permit the adjudication of a disciplinary case to be more akin to a
12 traditional court proceeding.

13 The results of the pilot program allowing for the paid hearing officer have
14 demonstrated that greater exposure to the adjudicatory process produces a
15 more efficient result. Familiarity with the process and the development of a
16 more “judicial” oversight increases proficiency in the processing of
17 disciplinary cases.

18 Finally, having a smaller group of hearing officers will allow for a more
19 concentrated training effort. The desire to achieve consistent results and
20 efficiency in the system can, in part, be achieved with better, more frequent

1 and more responsive training. This will become more realistic with a corps of
2 paid hearing officers. Consistency in the overall procedure and the result
3 should become more reliable for all participants.

4 The proposed rule also includes a provision to continue to utilize unpaid
5 attorney volunteers to serve as settlement officers in formal disciplinary
6 proceedings. In every formal case, at least one settlement conference is held.
7 See, Rule 57(f), Ariz.R.Sup.Ct. The settlement officer has the responsibility of
8 holding one such conference for the purpose of facilitating settlement of the
9 case. Under the current rule, the pool of volunteer hearing officers also serves
10 to fulfill the role of settlement officer. The new rule provides for a pool of
11 volunteers who would serve solely as settlement officers in formal disciplinary
12 proceedings.

13 The State Bar proposes in the rule the use of its Appointments Committee
14 to recommend individuals for appointment to the settlement officer position.
15 The State Bar's Appointments Committee has served as a useful tool to vet and
16 recommend applicants for various volunteer positions for appointment by the
17 Court. The use of this Committee would prompt meaningful consideration of
18 the qualifications of an applicant for the position. The result would be to allow
19 the Court to appoint individuals who are best suited to undertake the role and
20

1 who possess a commitment to the fair and timely administration of the
2 disciplinary process.

3 II. Text of Proposed Rule Change

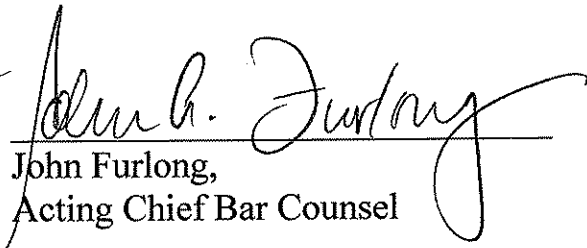
4 The text of the proposed rule changes is attached hereto as Appendix A.
5 The changes are shown in legislative format, with additions shown by a double
6 underline, and deletions shown by strike-throughs.

7
8 III. Conclusion

9 For the reasons set forth above, the State Bar of Arizona respectfully
10 petitions this Court to amend Rule 50 of the Rules of the Supreme Court and
11 include Rule 50.1, as set forth in Appendix A.

12 Respectfully submitted this 12th day of January 2009.

13
14 State Bar of Arizona

15
16 
17 John Furlong,
Acting Chief Bar Counsel

18 Electronic copy filed with the
19 Clerk of the Supreme Court of Arizona
this 12th day of January, 2009.

20 by: Kathleen A. Lundgren

APPENDIX A

Proposed Rule Changes
for consideration by the Discipline Oversight Committee

Rule 50. Hearing Officers

(a) Appointment. The Court shall appoint one or more, but no more than five hearing officers who shall receive compensation for their services. The court, upon recommendation of the commission, may appoint a lawyer who has been an active member for at least seven (7) years to serve as a hearing officer. A hearing officer may be terminated, at any time, by the court; and a new hearing officer appointed if necessary. If a vacancy occurs in a hearing officer position, the vacancy shall be filled in the manner provided for the original appointment. Hearing officers shall:

1. Be active members of the State Bar of Arizona, in good standing, who have been active members or judicial members of the state bar for at least seven (7) of the ten (10) years prior to their appointment;
2. Not be current members of the Board of Governors of the State Bar, nor have served on the Board of Governors during the 12 months prior to their appointment;
3. Not have been a respondent in a discipline or disability proceeding, reinstated from a disciplinary sanction or disability, represented respondent lawyers in discipline proceedings (whether during the investigation/informal proceedings or during formal proceedings), or served as bar counsel or volunteer bar counsel during the 12 months prior to appointment;
4. Not serve if their service would constitute conduct that violates any Ethical Rules.

(b) Removal. If a hearing officer becomes the subject of a charge of ethical misconduct and an order of probable cause is entered against that hearing officer, no new matters shall be assigned and all previously assigned matters shall be immediately reassigned to another hearing officer for all pending and subsequent proceedings. Upon conclusion of the disciplinary proceedings, the hearing officer may, at the discretion of the court, resume the powers and duties of a hearing officer.

(c) Terms of Office. Hearing officers shall be appointed for three (3) year terms. A hearing officer may serve consecutive terms at the court's discretion. A hearing officer whose term has expired may continue to serve until the conclusion of any proceeding commenced prior to the expiration of the term, and decision thereon, and until a successor is appointed.

(d) Powers and Duties. Hearing officers shall have the following powers and duties:

1. Hearing officers shall have statewide jurisdiction over proceedings on complaints of misconduct, applications for reinstatement, petitions for transfer to and from disability inactive status, and any other matters designated by the court, including contempt proceedings, upon assignment by the disciplinary clerk.
2. Hearing officers shall prepare findings of fact, conclusions of law, and issue orders consistent with these rules and, in appropriate cases, prepare and forward

to the commission findings, conclusions and recommendations, together with the record.

3. Hearing officers shall impose discipline as provided in these rules. Hearing officers shall sign their own orders.

4. Hearing officers shall file with the disciplinary clerk the originals of all documents and exhibits received or created that are part of the record.

(e) Change of Hearing Officer

1. Change for Cause.

A. Procedure. Upon motion and affidavit of a party and for good cause shown, the commission, through its chair, may order the removal or replacement of the assigned hearing officer and shall appoint a new hearing officer to consider a particular matter.

B. Time. Any request to remove a hearing officer for cause shall be filed within ten (10) days after discovery that grounds for removal exist.

C. Assignment. At the request of any hearing officer or on its own motion, the commission chair may assign from the active hearing officer membership list another hearing officer to act in place of the hearing officer being removed or replaced in a particular discipline, disability, or reinstatement matter.

2. Change as a Matter of Right.

A. Procedure. Each party is entitled as a matter of right to one (1) change of hearing officer. To exercise this right, a party shall file a "Notice of Transfer," which shall state the name of the hearing officer to be removed and it shall neither specify grounds nor be accompanied by an affidavit.

B. Time. Any request to remove a hearing officer as a matter of right shall be filed within ten (10) days of service of the notice of assignment of the hearing officer. Upon reassignment of a hearing officer, notice shall be timely as to the newly assigned hearing officer if filed within ten (10) days after notice of such new assignment and before a hearing commences. Failure to file a timely notice precludes transfer from a hearing officer as a matter of right.

C. Procedure Upon Notice of Transfer. Upon the filing of a Notice of Transfer by either party, the disciplinary clerk shall assign the matter to a new hearing officer as if making an initial assignment.

D. Waiver. A party waives the right to change of hearing officer as a matter of right when, after a hearing officer is assigned to the matter, the party agrees to the assignment or participates before that hearing officer in:

- (i) Any proceeding which concerns the merits of the action and involves the consideration of evidence or affidavits;
- (ii) A prehearing conference, as defined in Rule 57(g); or
- (iii) The commencement of a hearing.

(f) Compensation and Expense Payments. Hearing officers will receive ~~no~~ compensation for their services at a rate to be determined by the court but and may be reimbursed for their travel and other expenses incidental to the performance of their duties, as permitted by law.

Comment [2009 Amendment]

For purposes of ensuring efficient case management and consistency in the disciplinary process, the court will utilize paid hearing officers to adjudicate formal disciplinary cases.

Rule 50.1 Settlement officers

(a) The Court, upon recommendation of the State Bar of Arizona, may appoint lawyers to serve as settlement officers in attorney discipline matters. The lawyers appointed under this Rule shall receive no compensation for their service. Settlement officers appointed under this rule shall:

1. Be active members of the State Bar of Arizona, in good standing, who have been active members or judicial members of the state bar for at least seven (7) of the ten (10) years prior to their appointment;
2. Not be current members of the Board of Governors of the State Bar, nor shall they have served on the Board of Governors during the 12 months prior to their appointment;
3. Not have been a respondent in a discipline or disability proceeding, reinstated from a disciplinary sanction or disability, represented respondent lawyers in discipline proceedings (whether during the investigation/informal proceedings or during formal proceedings), or served as bar counsel or volunteer bar counsel during the 12 months prior to appointment;
4. Not serve if their service would constitute conduct that violates any Ethical Rules.

(b) Terms of Office. Settlement officers shall be appointed for three (3) year terms. A settlement officer may serve consecutive terms at the court's discretion. Settlement officers shall serve at the discretion of the Court, and may be removed for good cause.

(c) Compensation and Expense Payments. Settlement officers shall receive no compensation for their services but may be reimbursed for their travel and other expenses incidental to the performance of their duties, as permitted by law.